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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DWAYNE P. OTTINGER,

Defendant and Appellant.

H033892

(Santa Clara County
Super. Ct. No. CC306692)

In May 2003, defendant Dwayne P. Ottinger pleaded guilty to charges in three cases and was sentenced to consecutive terms totaling 11 years in state prison.¹ As part of this sentence, the court imposed a restitution fine of \$1,600 pursuant to Penal Code section 1202.4.

On November 7, 2008, Ottinger filed a motion for modification of sentence to reduce the restitution fine to \$200 based on his inability to pay. The motion was denied on November 26, 2008, and this appeal followed.

We appointed counsel to represent Ottinger in this court. Appointed counsel filed an opening brief which states the case and the facts, but raises no specific issues. We notified Ottinger of his right to submit written argument in his own behalf within 30 days. We received a supplemental letter brief from Ottinger on April 3, 2009. In that brief, Ottinger repeats the arguments he made to the superior court, namely that he does not

¹ We hereby take judicial notice of our nonpublished opinion, *People v. Ottinger* (Jan. 21, 2005, H027379), in which we affirmed Ottinger's conviction on direct appeal.

have the ability to pay the restitution fine. Ottinger additionally cites Penal Code section 1203.1b, subdivision (e) in support of this appeal.

The record does not affirmatively show that the trial court erroneously believed that it could not consider Ottinger's inability to pay in setting the amount of the fines in excess of the \$200 statutory minimum. We presume, in the absence of a contrary showing, that the trial court was aware of, and followed, the applicable law in sentencing Ottinger. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497, see also Evid. Code, § 664.)

Ottinger's reliance on Penal Code section 1203.1b is misplaced. That statute applies only where a "defendant is granted probation or given a conditional sentence." (Pen. Code, § 1203.1b, subd. (a).)

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *People v. Kelly* (2006) 40 Cal.4th 106, we have reviewed the whole record and have concluded there is no arguable issue on appeal.

DISPOSITION

The order of the trial court is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.